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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

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| CARSON OPTICAL, INC.,<br>*Plaintiff*,<br>v.<br>RQ INNOVASION INC.<br>And BRENDAN ZHENG,<br>*Defendants*. | Civil Action No: 1:16-cv-01157-LDW-ARL |

**REPLY MEMORANDUM OF LAW IN SUPPORT OF**
**MOTION TO DISMISS**

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| CARSON OPTICAL, INC.,<br>*Plaintiff*,<br><br>v.<br><br>RQ INNOVASION INC.<br>And BRENDAN ZHENG,<br>*Defendants*. | Civil Action No: 1:16-cv-01157-LDW-ARL<br><br>**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS** |

Defendants RQ INNOVASION, INC. ("RQ") and BRENDAN ZHENG ("Mr. Zheng" together with RQ, "Defendants"), by and through their undersigned counsel, hereby submit this Reply in further support of their Motion to Dismiss.

## INTRODUCTION

Carson's Opposition does not dispute the irrefutable fact that Defendants have done nothing that would subject them to personal jurisdiction on any of Carson's claims. Despite Carson's passionate pleas, RQ did not "target" Carson because the Amazon Sponsored Ad program it references makes it impossible to do so. In reality, Carson charges Defendants with mere untargeted negligence. Carson's Opposition instead asks the Court to ignore these inexcusable errors in its Complaint and permit it to continue to pursue meritless claims against the non-resident Defendants. In so doing, Carson relies on self-serving interpretations of new facts not averred in its Complaint nor supported by an affidavit. Unfortunately, the Complaint is not salvageable as is and must be dismissed for lack of personal jurisdiction. Moreover, Carson's Opposition all but admits that neither its claims against nor its alleged jurisdictional contacts of Mr. Zheng were pled *individually*. Instead, Carson bases Mr. Zheng's involvement solely based on his identity as an owner of RQ. This is wholly insufficient as a matter of law, and Mr. Zheng should be dismissed individually.

Second, Carson's Opposition fails to remedy the fatal flaws in its Lanham Act claim—its Complaint never asserts that Carson was injured, much less that Carson's *un*alleged injury was caused by the Defendants' actions.

Third, Carson's Opposition doubles down on its curious claim for "unfair and deceptive trade practices" by stating that it did not mean all those paragraphs it pled, asking the Court to ignore those nonactionable allegations and insisting its second count is virtually duplicative of its first. The claim still fails.

## ARGUMENT

### I. Personal Jurisdiction is lacking over RQ and Zheng in New York.

The Court should not take Carson's bait to presume it has personal jurisdiction over Defendants on the basis of conclusory allegations that either lack factual support or are demonstrably erroneous based on indisputable affidavits. Plaintiff does not bother disputing *any* of Defendants' jurisdictional averments which prove they have no connection to the State of New York. The sole jurisdictional act by Defendants that Carson could ever allege with respect to *these claims* are based on the faulty premise that Defendants knew Carson was in New York and thus the consequence of RQ's Canada-based communications about RQ's own products on Amazon or eBay must have been felt here. Courts in the Second Circuit have consistently held that the type of alleged injury here is insufficient under both New York's long arm statute and the Due Process clause. As such, personal jurisdiction over Defendants in New York is eternally lacking for Carson's claims.

*A. New York long-arm statute's requirements have not been satisfied.*

In the Opposition, Carson's alleged jurisdictional ties rest on flawed logic and misstatements of the law. For instance, Carson claims that the sale of a RQ product to nonparties constitutes a transaction of business in New York. (Opposition at 7).[1] If any of those parties were the plaintiff, and not Carson, on an action concerning the sale of *that product to them*, that argument might begin to make sense. However, here, that is not the case nor is it the law. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, 2015 WL 4634541, at *22 (S.D.N.Y. 2015)("Personal jurisdiction may not be exercised on the basis of a defendant's "random, fortuitous, or attenuated contacts."). Any sale by RQ to any other party is inconsequential. Carson's claim is that RQ mislabeled goods from an office in Canada. The facts underlying this claim are unrelated to RQ's *de minimis* sales activity in New York.

Importantly, Defendants have never shipped a single product directly to New York, ever. *See* Zheng Decl. at ¶ 4. Amazon shipped these products from its warehouses, and Amazon has no warehouses in New York. Zheng Decl. at ¶ 5. As to sales not made through Amazon.com, RQ participates in Amazon's "multi-channel fulfilment" program, which is a part of Amazon's "Fulfilled by Amazon" ("FBA") program, where Amazon can ship products from its warehouses to customers based on sales made on channels other than Amazon, i.e. from RQ's own website and eBay. *See* Zheng Decl. at ¶ 3. That is exactly what happened, here. Anyone could purchase an RQ product from any of those sources and Amazon was prepared to ship it regardless of the state the customer happened to reside. Thus, the location of delivery of its products was not in RQ's "realm of contemplation" such that those sales should be considered demonstrative of Defendants having "purposely invoke[ed] the benefits and protections of New York law." *Sayeedi v. Walser*, 15 Misc. 3d 621, 628 (N.Y. City Civ. Ct. 2007).

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[1] Defendants also note that Carson's representations as to RQ's New York sales figures in the first Zheng Declaration are false and misleading. To be clear, RQ has not sold 6,000 of the subject products in New York—RQ's sales in New York are a small fraction of that amount. *See* Zheng Declaration dated February 24, 2017 ("Zheng Decl.") at ¶ 2.

> It has not been shown to this court's satisfaction that the defendant purposefully invoked the benefits and protections of New York law. No evidence was provided by plaintiff as to defendant's overall eBay statistics, experience, or of any marketing directed at potential customers, designed for instance, to welcome bids from New Yorkers or any other acts that indicate defendant may be purposely availing himself specifically to the business of New Yorkers or any desire to take advantage of New York law. The defendant was prepared to sell his Chevrolet engine to whoever the highest bidder happened to be regardless of the state in which they happened to reside. Given this unique sale style, even though a contract may be formed, the location of delivery is not likely in the seller's realm of contemplation. In the typical on-line auction sale the ultimate destination of any item is completely determined by the potential buyers through the bidding process. Accordingly, to summon the defendant into a New York court on this matter would contravene the traditional notions of "fair play" and "substantial justice" that have become the touchstone of personal jurisdiction.

*Sayeedi*, 15 Misc. 3d at 628.

Similarly, the location of the alleged mislabeling, even if distributed over the internet, has nothing to do with New York. Carson's cause of action for mislabeling would exist regardless of where Carson is, whether Amazon shipped RQ's products to New York, or if they were even sold at all. However, that open-ended proposition does not mean that Defendants should be haled into New York for that claim. Put another way, national circulation or Internet-based distribution of advertisements is not a significant contact with a forum state for due process purposes. *See Skrodzki v. Marcello*, 810 F. Supp. 2d 501, 517 (E.D.N.Y. 2011). RQ's website and alleged mislabeling on Amazon or eBay are "more akin to advertisement[s] in a nationally-available magazine or newspaper, and do[] not without more justify the exercise of jurisdiction over [the Defendants]." *See Marcello*, 810 F. Supp. 2d at 517; *see also*, *Lawson Cattle & Equipment, Inc. v. Pasture Renovators LLC*, 139 Fed. Appx. 140 (11th Cir. 2011) ("merely advertising in magazines of national circulation that are read in the forum state is not a significant contact for jurisdictional purposes. Otherwise, a business that advertised in a national magazine would be subject to jurisdiction in virtually every state. While these contacts count, they do not count for much.") (quotation marks and citation omitted); *Leone v. Cataldo*, F. Supp. 2d 471, 481 (E.D. Pa 2008) (finding that an advertisement in a magazine with multi-state circulation, distributed in the forum state, would be insufficient on its own to support specific jurisdiction); *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 297 F. Supp. 2d 1154 (W.D. Wis. 2004) (Internet-based false advertising case where Court held that advertisements on website not sufficient for personal jurisdiction purposes and sales of products through that website were unrelated to the plaintiff's claim); *ICP Solar Technologies, Inc. v. TAB Consulting, Inc.*, 413 F. Supp. 2d 12 (D.N.H. 2006) (false advertising defendant did not purposely avail itself of the privilege of conducting business in the forum state, although defendant sold products to national retailer who in turn sold those products in forum state, in the absence of evidence that defendant specifically intended to serve the forum state's market). Furthermore, Carson's reference to the mention of "non-profit organizations in New York" on RQ's website is virtually meaningless in that, other national and non-New York organizations are listed there as well. The single webpage is nothing more than a listing of several dozen vision-related non-profit organizations throughout the country. To hold that this evinced an intent to serve the New York market would subject Defendants to suit virtually anywhere. This is theory of jurisdiction is inconceivable and has been universally rejected.

Despite Carson's passionate pleas, RQ does not and did not "target" Carson when marketing RQ's own goods on Amazon.com. Defendants already addressed this factual inaccuracy in its opening brief, and Carson has submitted no facts in support of its claim. The fact that an RQ-product may appear on Carson's listings is not an act over which RQ either has any control (that is Amazon's algorithms) or knew about it when labeling its products. To hold that this type of unintended marketing constitutes jurisdictionally-related "targeting" makes the word target devoid of any meaning. In addition to it being impossible for RQ to do so under Amazon's automatic sponsored ad campaigns, even if it were true that RQ was using "Carson" or a Carson mark (which it is not), the Second Circuit has routinely rejected the premise that keyword advertising that is not likely to cause consumer confusion is actionable under the Lanham Act. *See Alzheimer's Found. of Am., Inc. v. Alzheimer's Disease & Related Disorders Ass'n, Inc.*, 2015 WL 4033019, at *6 (S.D.N.Y. 2015). If anything, Carson's allegations related to Amazon's sponsored ads do not mean that RQ targeted Carson, rather *Amazon did*. Amazon's acts should not be applied to RQ absent some knowledge of the result, which is totally lacking here. *See Gary Null & Assocs., Inc. v. Phillips*, 29 Misc. 3d 245, 250-51 (N.Y. Sup. Ct. 2010) ("Google ads [are] insufficient to constitute the "transaction of business" within the meaning of CPLR 302(a)(1), . . . as [the defendant] has no control over which ads appear on his website, he does not know how Google chooses which ads to display, and he has "never selected any particular ad for display.").

*B. An exercise of jurisdiction would not comport with fair play and substantial justice.*

Even were the Court to decide that an exercise of jurisdiction under New York's long-arm statute were proper, an assertion of jurisdiction would offend the Due Process Clause. As stated above, Defendants' New York contacts are related only to a handful of items shipped by Amazon to customers who are not in this suit. There is no direct relationship between those sales or those customers and Carson—indeed, Plaintiff's cause of action arises not of out these limited sales, but rather from Defendants' advertising, which has its locus in Canada. New York's relationship to this case exists solely because a self-described giant monolith, Carson, has its offices here. On the other hand, Defendants are based in Edmonton, Canada. RQ's staff is likewise based in Canada. Edmonton is over 2500 miles away from the Court. Amazon is based in Washington. Thus, litigating a suit in New York is unbearably difficult for defendant and extremely inconvenient for potential witnesses. Furthermore, under Carson's shifting theory of personal jurisdiction, based solely on its presence in New York, Defendants would likely be subject to suit for these very same claims in all 50 states by numerous untold and unidentified competitors. This obviously is not a situation contemplated when RQ labeled its goods in Canada and shipped them to Amazon warehouses *not* in New York, such that it would be unreasonable to hale Defendants here.

*C. Federal long-arm jurisdiction's requirements have not been satisfied.*

In a last ditch effort to salvage Carson's false claims of jurisdiction, Carson asserts, for the first time, that its claim "qualifies" for federal long-arm jurisdiction under Fed. R. Civ. P. 4(k)(2). However, Carson fails to satisfy its threshold burden to show "that personal jurisdiction is not available under any situation-specific federal statute" and to "certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state." *Porina v. Marward Shipping Co.*, 2006 WL 2465819, at *4 (S.D.N.Y. Aug. 24, 2006), *aff'd,* 521 F.3d 122 (2d Cir. 2008). In the Opposition, Carson improperly attempts to pass this burden on to Defendants and, in conclusory fashion, assumes that jurisdiction is improper everywhere else. *See* (Opposition at 11). Carson's inferential leap has no support in fact, much less supported by an affidavit submitted by Carson, and improperly excuses plaintiff of its burden to demonstrate the availability of federal long-arm jurisdiction. *See, e.g.*, *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999).

*D. Carson fails to assert jurisdictional facts specific to Mr. Zheng.*

Carson's Opposition admits that the Complaint does not allege that Mr. Zheng engaged in any business in New York sufficient to confer jurisdiction over him individually, and now asserts a theory of agency supports personal jurisdiction over him. This argument fails—even Carson's own authority says so. *See Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319, 324 (S.D.N.Y. 1998). Conclusory allegations devoid of "any factual specificity" are insufficient to support an exercise of jurisdiction over a corporate officer. *See Gitner*, 16 F. Supp. 2d at 324 ("As alleged, this Court thus has no basis for knowing whether the six named defendants actually orchestrated the allegedly tortious conduct, or were named in the Complaint simply because their names appear at the top of TWA's masthead."). Here, Carson's Opposition does not even attempt to point to any specific conduct that Mr. Zheng did and instead points to self-serving interpretations of online profiles. Rather, Mr. Zheng averred to specific facts that disprove his primary role, much less any role in labeling RQ's products. Carson does nothing to refute those averments. Carson's claims are all speculative and based solely on Mr. Zheng's identity as an owner of RQ, and thus are insufficient for personal jurisdiction purposes. As such, Mr. Zheng should be summarily dismissed from this action.

## II. Carson's Lanham Act claim fails because Carson never alleged it lost sales.

Carson's Opposition appears to argue heavily for language that simply does not match its Complaint, to wit: there is no allegation that Carson lost sales or business reputation as required by the Supreme Court's decision in *Lexmark.* Carson claims that its allegation that it was "forced to sell" products at an "unfair competitive disadvantage" means that it suffered lost sales absent an allegation that it lost sales. How so? The phrase, "forced to sell" does not mean that Carson lost business. It is equally, if not more, likely that Carson's sales have gone up. Instead in the Opposition, Carson's counter is that they said they were competitors, so they do not need to allege any *Lexmark*-like injury, i.e. lost sales. This is unacceptable.

This quagmire of uncertainty is created solely by Carson's spotty pleading and the Court should not presume that Carson was harmed simply because it claims it is a competitor. *See Porous Media Corp. v. Pall Corp.*, 119 F. 3d 1329, 1334 (8th Cir. 1997) ("where a defendant is guilty of misrepresenting its own product without targeting any other specific product, it is erroneous to apply a rebuttable presumption of harm in favor of a competitor. Otherwise, a plaintiff might enjoy a windfall from a speculative award of damages by simply being a competitor in the same market."). If it would be erroneous to presume harm in favor of a competitor when a defendant misrepresents its own product without targeting, it should also be erroneous to presume that Carson was injured when, as here, it does not state that it was.

Absent an allegation of injury or that Carson's *un*alleged injury was caused by the Defendants' actions, the Lanham Act claim should be dismissed.

## III. Carson's "unfair and deceptive trade practices" claim fails under any rubric.

When faced with the inevitable disposition of its "unfair and deceptive trade practices" claim, Carson's Opposition doubles down by stating that it did not mean what it pled—insisting its second count is virtually duplicative of its first Lanham Act claim. As a threshold matter, Carson's again cites *trademark cases* or trademark comparative advertising cases to support the proposition that "false advertising . . . may also be pled as a common law unfair competition claim." (Opposition at 16). Again, mislabeling cases are categorically different than trademark cases. *See Luv N' Care, Ltd. v. Walgreen Co.*, 695 F. Supp. 2d 125, 135 (S.D.N.Y.

2010); *Perkins Sch. for the Blind v. Maxi-Aids, Inc.*, 274 F. Supp. 2d 319, 327 (E.D.N.Y. 2003). Assuming, *arguendo*, that Carson is now alleging that its second count is really a N.Y. General Business Law § 349 claim, it still fails because Carson does not allege any direct injury. Due to Carson's failure to allege injury as a result of Defendants' actions and, the attenuated nature of its purported injury, even its newly purported § 349 claim would fail.

As such, Carson's second cause of action must be summarily dismissed.

Dated: Brooklyn, New York
February 24, 2017

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